

EXHIBIT 2

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Case No. 1:16-CV-08364

ANNE DE LACOUR, ANDREA WRIGHT, and LOREE
MORAN, individually and on behalf of all
others similarly situated,

Plaintiffs,

vs.

COLGATE-PALMOLIVE CO. and TOM'S
OF MAINE, INC.,

Defendants.

CONFIDENTIAL REMOTE DEPOSITION

OF

MICHAEL DENNIS

September 19, 2022

Reported by: Robin LaFemina, RPR, CLR

Job No.: 5421319

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2 A. I did. 10:15:41

3 Q. Can you tell me what, if any, 10:15:51

4 were the contributions of Mr. Weir to the 10:15:54

5 design of your toothpaste survey? 10:16:00

6 A. I'm sure I would have been asked 10:16:10

7 this for -- when I was deposed regarding the 10:16:11

8 toothpaste conjoint survey, so I expect 10:16:16

9 there's a record there we could look at. As 10:16:18

10 I recall today, Mr. Weir would have given me 10:16:26

11 advice on the real world market prices, in 10:16:29

12 other words, the prices that the consumers 10:16:36

13 paid for the at issue toothpaste products. 10:16:38

14 So that's one way that Mr. Weir contributed, 10:16:45

15 is to help me think through what price 10:16:47

16 points to feature in my conjoint survey and 10:16:50

17 how those price points incorporate any 10:16:54

18 supply side factors. I think that's the 10:16:59

19 primary way Mr. Weir would have helped me. 10:17:02

20 I would have also asked for his advice on my 10:17:05

21 attribute selection for the conjoint survey 10:17:08

22 because ultimately he is the end user of the 10:17:13

23 price premium statistics and he's a court 10:17:18

24 qualified designer of conjoint surveys, so I 10:17:21

25 respect his opinion and ask for his advice 10:17:25

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2 on overall design issues like that. 10:17:30

3 Q. Anything else Mr. Weir 10:17:43

4 contributed to your survey design for the 10:17:45

5 toothpaste products? 10:17:47

6 A. I cannot think of anything else, 10:17:48

7 counsel. 10:17:51

8 Q. All right. I'm going to ask you 10:17:58

9 the same question, if I could, for the 10:18:00

10 deodorant survey. Can you tell me what Mr. 10:18:02

11 Weir's contributions were to the design of 10:18:09

12 your deodorant survey? 10:18:11

13 A. It is the same role. It is the 10:18:12

14 same role. So, if we could insert here what 10:18:13

15 I just said about the toothpaste survey in 10:18:18

16 Mr. Weir's role, let's substitute the word 10:18:23

17 deodorant for toothpaste, I think we have an 10:18:26

18 accurate record of Mr. Weir's contribution. 10:18:28

19 Q. All right. 10:18:34

20 So in terms of the deodorant 10:18:35

21 survey, Mr. Weir provided some input on 10:18:37

22 price points to use in the survey and on 10:18:44

23 attribute selection for the survey; is that 10:18:46

24 right? 10:18:51

25 A. That's correct. But I guess I 10:18:59

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2 should just probably put on the record again 10:19:00
3 so it's clear, the primary role for Mr. Weir 10:19:02
4 is to provide me his advice with respect to 10:19:04
5 the real world market prices that consumers 10:19:10
6 paid for these products, and that informs 10:19:15
7 the price points that I decide to feature in 10:19:19
8 the conjoint survey. So that's his first 10:19:22
9 and primary contribution, and then, again, 10:19:26
10 because I value his opinion as a court 10:19:31
11 qualified expert with price premium surveys, 10:19:34
12 I look to him to -- for any reactions and 10:19:40
13 advice he has on my attribute selection. 10:19:45

14 Q. Okay. So let me make sure I've 10:19:58
15 got that down right. 10:20:00

16 Mr. Weir's contribution to both 10:20:01
17 your surveys, deodorant and toothpaste 10:20:03
18 surveys, were advice on the real world 10:20:06
19 market prices and the price points to use in 10:20:08
20 your survey, that was the primary 10:20:16
21 contribution, and a second contribution was 10:20:18
22 some advice on the attribute selections in 10:20:20
23 your surveys; is that accurate? 10:20:22

24 A. I tried to be -- your 10:20:30
25 restatement was not as nuanced as what I put 10:20:31

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2 out twice now. So I think what I said 10:20:36

3 before is what I want on the record and is 10:20:38

4 accurate and complete. 10:20:41

5 Q. All right, but I'm just talking 10:20:45

6 about these buckets. You talked about 10:20:47

7 real -- number one, real world market prices 10:20:48

8 and price points to use in the survey, and, 10:20:52

9 number two, bucket number two, attribute 10:20:56

10 selection. Are there any other buckets or 10:20:58

11 topics that Mr. Weir contributed to your 10:21:00

12 survey -- survey designs? 10:21:03

13 MS. WESTCOT: Objection. 10:21:08

14 Misstates the witness's prior 10:21:08

15 testimony. Asked and answered. Vague. 10:21:09

16 A. If your question is only about 10:21:17

17 buckets and enumerating the buckets and the 10:21:19

18 question is not asking me to separate with 10:21:24

19 nuance in details, if that's what this 10:21:27

20 question is, then my answer is those are the 10:21:30

21 two primary buckets. 10:21:32

22 Q. Other than the price -- the 10:21:41

23 contributions to pricing and attribute 10:21:42

24 selection that you've just described, 10:21:47

25 including all the nuances that you laid out, 10:21:49

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2 other than those two topics, did Mr. Weir 10:21:53
3 have any other contributions to either of 10:21:55
4 your survey designs? 10:21:59

5 A. To the survey designs, no, those 10:22:04
6 are the two buckets, and I provided a 10:22:06
7 complete description of his role in the 10:22:12
8 conjoint design. 10:22:15

9 Q. Apart from survey design, which 10:22:24
10 you've just pointed out, did Mr. Weir have 10:22:26
11 any other contributions to any of your 10:22:29
12 analysis? 10:22:30

13 A. Well, I did, in terms of the 10:22:41
14 analysis of the conjoint survey data, I 10:22:42
15 would have shared my plans for how to 10:22:45
16 analyze the conjoint survey data with 10:22:48
17 Mr. Weir to make sure we're on the same page 10:22:52
18 because ultimately he's using my price 10:22:55
19 premium statistics for the calculation of 10:22:59
20 damages, so I would have consulted with him 10:23:02
21 to make sure Mr. Weir agrees with my -- my 10:23:05
22 analysis plans. 10:23:10

23 Q. Did he? 10:23:15

24 A. Was there a question, counsel? 10:23:20

25 Q. Yeah. My question was did he? 10:23:22

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2	Did he agree with your analysis plans?	10:23:25
3	A. Yes. Yes, he did. We're on the	10:23:27
4	same page.	10:23:32
5	Q. Great.	10:23:32
6	MR. LAZATIN: Shall we take a	10:23:36
7	quick break?	10:23:37
8	MS. WESTCOT: Sure.	10:23:38
9	THE VIDEOGRAPHER: If	10:23:41
10	everybody's ready, stand by.	10:23:42
11	We are going off the record.	10:23:43
12	This is the end of media unit 1. The	10:23:44
13	time is 10:22 a.m.	10:23:46
14	(Whereupon, a brief recess was	10:23:46
15	taken.)	10:33:18
16	THE VIDEOGRAPHER: We are back	10:33:18
17	on the record. This is the start of	10:33:19
18	media unit 2. The time is 10:32 a.m.	10:33:21
19	CONTINUED BY MR. LAZITAN:	10:33:24
20	Q. Dr. Dennis, we were talking	10:33:24
21	about Colin Weir before the break.	10:33:26
22	Do you recall that?	10:33:32
23	A. I do.	10:33:33
24	Q. In connection -- I'm going to	10:33:34
25	ask you first about your toothpaste survey.	10:33:39

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2 listed as Paul Green and V. Srinivasan. 01:46:43

3 Q. Do you recognize Exhibit 8, 01:46:51

4 Dr. Dennis? 01:46:59

5 A. Yes, I cite it in my report. 01:46:59

6 Q. Well, that was my next question. 01:47:00

7 Exhibit 8 is the Green and 01:47:02

8 Srinivasan article cited at footnote 7 of 01:47:05

9 your report; correct? 01:47:08

10 A. That's right. 01:47:09

11 Q. And you, again, to cite the 01:47:14

12 obvious perhaps, you reviewed and considered 01:47:16

13 the article at Exhibit 8 in formulating your 01:47:20

14 opinions in this case; right? 01:47:23

15 A. That's right. 01:47:26

16 Q. Okay. You can put aside 01:47:45

17 Exhibit 8, Dr. Dennis. 01:47:48

18 I'm going to refer you again 01:47:49

19 back to your report, Exhibit 1. Let's look 01:47:50

20 at footnote 9 on page 9. 01:47:52

21 A. Yes, I see it, counsel. 01:48:24

22 Q. You know what? I pointed you to 01:48:25

23 the wrong corner. Forgive me. 01:48:27

24 Paragraph 24. I'm sorry. 01:48:34

25 A. Okay. I'm there. 01:48:45

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2 Q. Paragraph 24 begins with your 01:48:47
3 statement that I designed and conducted the 01:48:50
4 price premium surveys by considering Best 01:48:53
5 Practices For Litigation Surveys as 01:48:56
6 documented by Professor Shari Seidman 01:48:58
7 Diamond of Northwestern University in her 01:49:00
8 Reference Guide on Survey Research. It's 01:49:04
9 the first sentence of paragraph 24 in your 01:49:09
10 report; right? 01:49:11

11 A. That's right. 01:49:12

12 Q. And then there is citation to 01:49:18
13 the Diamond Reference Guide, to Robert 01:49:19
14 Groves' textbook, Survey Methodology, to a 01:49:31
15 Robert Marsden Handbook of Survey Research, 01:49:34
16 and there's a Psychology of Survey Response 01:49:37
17 by Roger Tourangeau. 01:49:43

18 Do you see those citations? 01:49:47

19 A. I do. 01:49:49

20 Q. There's also Orme, isn't there, 01:49:50
21 at the end of the paragraph 24; right? 01:49:52

22 A. That's right. 01:49:54

23 Q. Okay. 01:50:08

24 My question for you is: Of the 01:50:08
25 four reference works that you cited in 01:50:11

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2 paragraph 24, can you point me to any of 01:50:13
3 these four reference works you cite that 01:50:16
4 specifically discuss and approve of using 01:50:19
5 conjoint analysis to determine price 01:50:24
6 premiums market price? 01:50:27

7 MS. WESTCOT: Objection to form. 01:50:37

8 A. Well, price premium is a -- so 01:50:38
9 the short answer to your question is that 01:50:40
10 the price premium concept is built on the 01:50:53
11 conjoint survey methodology. Without the 01:50:57
12 conjoint survey methodology, there would not 01:50:58
13 even be the possibility of price premium 01:51:00
14 analogies, so conjoint surveys -- at the 01:51:04
15 heart of conjoint surveys is the ability to 01:51:08
16 quantify consumer preferences and understand 01:51:14
17 the economic value that consumers place on 01:51:16
18 attributes and levels of attributes, which 01:51:19
19 is exactly what a price premium survey is, 01:51:24
20 too. A price premium survey is just 01:51:27
21 measuring the market price that would be 01:51:33
22 established as a result of any change that's 01:51:34
23 made to an attribute. 01:51:36

24 Q. Okay. Let's take that concept 01:51:51
25 as you just articulated it, market price. I 01:51:53

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2 don't want to misquote you, Dr. Dennis. 01:52:05

3 You referred to measuring the 01:52:12

4 market price that would be established as a 01:52:16

5 result of any change that's made to an 01:52:18

6 attribute, let's call it a product 01:52:20

7 attribute, and my question is: Can you 01:52:28

8 point me specifically to which of these 01:52:29

9 sources in paragraph 24 of your report does 01:52:32

10 that? 01:52:42

11 A. Yes. The Orme book has an 01:52:42

12 entire chapter on conjoint analysis using 01:52:45

13 market simulators, and so that answers your 01:52:47

14 question there, there's an entire chapter in 01:52:52

15 Mr. Orme's book about how to use conjoint 01:52:55

16 surveys in market simulations -- 01:52:58

17 Q. Mm-hmm. 01:53:02

18 A. -- to measure changes in the 01:53:03

19 marketplace that can occur as a result of 01:53:05

20 changes in product attributes. 01:53:08

21 Q. Do you remember the title of 01:53:13

22 that chapter? 01:53:15

23 A. I believe it's called Market 01:53:18

24 Simulators or Market Simulations. 01:53:19

25 Q. Okay. 01:53:22

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2 Any other references in these 01:53:29
3 four -- in any of the sources you cite in 01:53:31
4 paragraph 24 that -- that say you can 01:53:35
5 measure a market price that results from a 01:53:48
6 change to a -- made to an attribute, your 01:53:50
7 words? 01:53:57

8 A. Well, the Sawtooth research 01:53:57
9 series has articles on conjoint analysis. 01:53:59
10 Sometimes we'll mention market simulations 01:54:04
11 as one of the analytic capabilities of 01:54:06
12 conjoint analysis. So if you look at a 01:54:10
13 series of research papers in the Sawtooth 01:54:16
14 series about how to analyze conjoint data, 01:54:20
15 sometimes written by Mr. Orme, but sometimes 01:54:28
16 not written at all, it's with a named 01:54:30
17 author, it's explaining how to use the 01:54:35
18 conjoint analysis tools in order to measure 01:54:37
19 the economic value associated with 01:54:42
20 attributes, and then, furthermore, to figure 01:54:45
21 out what market share would result if there 01:54:47
22 were a change in product attributes. 01:54:51

23 Q. Okay. 01:55:06

24 Can you name a specific -- you 01:55:06
25 said these were the Sawtooth research 01:55:08

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2 papers. Can you name a specific article, 01:55:10

3 title, author, date? 01:55:11

4 A. I can't give you all the titles, 01:55:18

5 but there is a research paper there called 01:55:20

6 Market Simulation, you can look it up 01:55:22

7 yourself in the Sawtooth series. 01:55:24

8 Q. All right. 01:55:25

9 A. Every version of Sawtooth, I 01:55:26

10 know there's a Sawtooth analysis Version 9 01:55:27

11 research paper because I think I reference 01:55:31

12 it in my paper -- in my report, but for 01:55:32

13 every new release of Sawtooth when they went 01:55:38

14 from version 8 to version 9, they put out a 01:55:41

15 new white paper on how to use the conjoint 01:55:44

16 tools for market simulations. So there are 01:55:53

17 some examples for you there. I already 01:55:55

18 mentioned Mr. Orme's book. He has an entire 01:55:58

19 chapter dedicated to it. Even what you 01:56:02

20 mentioned already from Mr. Orme, he is 01:56:05

21 talking about forecasting. The whole point 01:56:06

22 of forecasting is to figure out what's going 01:56:08

23 to be the impact on the marketplace as a 01:56:10

24 result of making changes to product 01:56:12

25 attributes as features. 01:56:14

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2 Q. Okay. 01:56:19

3 Any other specific sources you 01:56:20

4 can cite me to on this point? Again, market 01:56:25

5 price resulting from calculating market 01:56:28

6 price resulting from a change made to an 01:56:32

7 attribute. 01:56:39

8 A. I think that will do. Those are 01:56:40

9 several examples for you right there. 01:56:42

10 Q. Okay. Thank you. And I will be 01:56:43

11 happy to look those up. 01:56:45

12 Okay. Let's go back to your 01:56:58

13 report and go to Attachment C3. I will try 01:57:01

14 to get you a PDF page for that. 01:57:08

15 A. Could you tell me the 01:57:25

16 substance -- what is C3? 01:57:27

17 Q. This was a screener section for 01:57:29

18 toothpaste that we went over earlier. 01:57:30

19 A. Okay. I'm there, counsel. 01:57:37

20 Q. All right. 01:57:47

21 I wanted to take a look at the 01:57:49

22 various attributes in the survey portion, 01:57:51

23 not the screener survey, but the survey 01:57:54

24 portion, and at the end of the various 01:57:57

25 questions, there's a chart listing all of 01:58:04

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2 interviews, that is, you did some research 02:09:01

3 and you discovered you could mine baking 02:09:06

4 soda, I think is what you said, and so you 02:09:10

5 bring your personal opinion to bear in 02:09:13

6 making that decision? 02:09:14

7 MS. WESTCOT: Objection to form. 02:09:15

8 Compound. Misstates the witness's 02:09:17

9 prior testimony. 02:09:18

10 A. I was very clear on the record 02:09:19

11 about this. I didn't think that 02:09:20

12 respondent's insight, if you will, rose to 02:09:27

13 the level of causing me to rethink whether 02:09:29

14 to put those two levels together in the same 02:09:31

15 choice task, but that was an expert judgment 02:09:34

16 call that I made like I made in every survey 02:09:41

17 that I design. I use my expert judgment. 02:09:44

18 Q. We have -- Dr. Dennis, you and I 02:10:07

19 have talked in previous depositions about 02:10:09

20 supply side factors; correct? 02:10:11

21 A. Yes. 02:10:12

22 Q. Can you -- can you describe to 02:10:19

23 me what you understand in terms of 02:10:21

24 relationship to conjoint what supply side 02:10:22

25 factors refers to? 02:10:24

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2 A. With respect to conjoint? 02:10:34

3 Q. Yeah. 02:10:35

4 A. Sure. Happy to talk about that. 02:10:36

5 The conjoint survey is a methodology that 02:10:38

6 does quantify consumer preferences and turns 02:10:42

7 that into useful information about what 02:10:46

8 consumers value in terms of if we discussed 02:10:54

9 attributes and then levels of attributes. 02:10:57

10 The supply side part of this is about how to 02:11:01

11 make sure that the conjoint survey itself is 02:11:03

12 incorporating supply side factors, and the 02:11:12

13 incorporation of the supply side factors is 02:11:15

14 important in order to make sure that the 02:11:17

15 conjoint survey is market realistic and 02:11:19

16 relevant for -- for marketplaces, in this 02:11:21

17 case, the retroactive backward looking 02:11:24

18 determination of what the market clearing 02:11:29

19 price would have been if defendants had not 02:11:36

20 used the natural claim. So the conjoint 02:11:37

21 survey appropriately incorporates supply 02:11:39

22 side factors by making sure that the product 02:11:42

23 profiles shown to respondents introduce 02:11:47

24 market competition, so that's why my brand 02:11:57

25 attribute, for instance, includes the 02:12:00

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2	competitors, a number of the key competitors	02:12:00
3	of the Tom's of Maine product, again, to	02:12:02
4	replicate a real marketplace because in the	02:12:06
5	real marketplace, there are real companies	02:12:08
6	with real brands competing head to head.	02:12:10
7	That's a supply side consideration, and	02:12:12
8	obviously I included market-based pricing in	02:12:16
9	my conjoint survey in terms of the price	02:12:20
10	attribute, and then furthermore in the	02:12:22
11	analysis that I did, I did the same. So	02:12:26
12	just to repeat, you know, conjoint surveys	02:12:28
13	clearly quantify consumer preferences, and	02:12:32
14	it's my opinion that it's important to still	02:12:34
15	incorporate in the design, in the analysis	02:12:37
16	the supply side considerations as well.	02:12:40
17	Q. So I think if I heard you	02:12:49
18	correctly, you discussed the effect of	02:12:50
19	market competition as a supply side	02:12:51
20	consideration, and that you used	02:12:54
21	market-based prices as a supply side	02:12:55
22	consideration. Anything else that you --	02:12:57
23	can you list anything else in terms of	02:13:00
24	supply side factors that are incorporated in	02:13:01
25	your conjoint survey design from this case?	02:13:06

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2 A. The answer I gave you was my 02:13:15
3 cliff notes version of it. 02:13:17

4 Q. Okay. 02:13:18

5 A. The short briefing version of 02:13:18
6 it. The fuller elaboration of it does go 02:13:20
7 into more detail about market-based pricing 02:13:26
8 that is in my survey in the price attribute 02:13:36
9 and goes into more detail about what does it 02:13:39
10 mean to feature a price point in my survey 02:13:41
11 of let's say \$4. What I am literally doing 02:13:43
12 is putting a price point in my survey and 02:13:54
13 then later in my analysis that takes into 02:13:56
14 account the actual marketplace transactions 02:13:59
15 that occur between buyers and sellers. 02:14:01
16 That's how we get to those price points. 02:14:03
17 So a seller's willingness to sell will be 02:14:09
18 determined at least in part by their 02:14:12
19 production cost, research and development 02:14:14
20 cost, marketing, you know, all the costs of 02:14:16
21 producing the goods. So by taking into 02:14:19
22 account these price points in my market 02:14:28
23 survey -- my consumer conjoint survey, I am 02:14:30
24 also taking into account the seller's 02:14:34
25 willingness to sell at those price points, 02:14:36

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2 and that's another way that supply side 02:14:38

3 considerations are baked into my survey. 02:14:40

4 Q. Can you explain to me how your 02:14:42

5 survey addresses the first supply side 02:14:44

6 consideration you mentioned, which is market 02:14:52

7 competition? How does your survey design 02:14:54

8 address market competition as a supply side 02:15:04

9 factor? 02:15:07

10 A. Because I created a hypothetical 02:15:08

11 marketplace in my conjoint survey where 02:15:10

12 there are essentially brands competing with 02:15:16

13 each other, so that's a -- a way for us to 02:15:18

14 replicate the real world marketplace, and 02:15:30

15 acknowledging and building into the conjoint 02:15:32

16 survey that these are real companies 02:15:37

17 competing with each other. 02:15:40

18 Q. Okay. 02:15:42

19 And you replicate that 02:15:42

20 competition you said by incorporating real 02:15:45

21 world brands in your conjoint; correct? 02:15:47

22 Competitors' brands? 02:15:52

23 A. That's right. 02:15:53

24 Q. Anything else in terms of 02:15:59

25 bringing market competition to bear, 02:16:00

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2 incorporating that into your conjoint? 02:16:07

3 Anything else you did? 02:16:10

4 A. I think that's an adequate 02:16:16

5 summary. 02:16:18

6 Q. All right. Thank you. 02:16:18

7 MR. LAZATIN: Why don't we -- 02:16:23

8 why don't we take a quick break. 02:16:25

9 THE VIDEOGRAPHER: We are going 02:16:29

10 off the record. This is the end of 02:16:29

11 media unit 4. The time is 2:15 p.m. 02:16:31

12 (Whereupon, a brief recess was 02:16:31

13 taken.) 02:16:35

14 THE VIDEOGRAPHER: We are back 02:28:29

15 on the record. This is the start of 02:28:29

16 media unit 5. The time is 2:27 p.m. 02:28:31

17 CONTINUED BY MR. LAZATIN: 02:28:42

18 Q. Dr. Dennis, I would like to mark 02:28:42

19 the next -- well, actually it's the same 02:28:43

20 exhibit, Exhibit 6. We can pull up the part 02:28:45

21 I'm referring to if you'd like, but I was 02:28:48

22 just going to ask conceptually you about 02:28:50

23 there is a reference in the form to 02:28:54

24 sensitivity analysis using market 02:28:56

25 simulations and we can pull it up if you'd 02:28:59

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2 like, but the question was to ask you to 02:29:01
3 educate me on what sensitivity analysis is 02:29:03
4 as it relates to conjoint. 02:29:10

5 A. Well, sensitivity tests could 02:29:17
6 take various forms. I mean, I can tell 02:29:20
7 you -- a sensitivity test as a concept 02:29:21
8 refers to whether there are statistically 02:29:24
9 different differences and the results, as a 02:29:31
10 result of, for instance, looking at 02:29:34
11 subpopulations and comparing subpopulations 02:29:38
12 to each other, or for that matter, looking 02:29:41
13 at the paradata for surveys and see if the 02:29:46
14 results from the conjoint study vary as a 02:29:50
15 result of length of time spent completing 02:29:57
16 and answering the survey questions, so 02:30:04
17 sensitivity tests is just another way of 02:30:06
18 saying looking for differences between 02:30:08
19 groups and the, in this case, the price 02:30:09
20 premium analyses. 02:30:12

21 Q. Okay. Maybe we should get a 02:30:21
22 little more specific. Let's pull up 02:30:23
23 Exhibit 6, and it's page 81 of the textbook. 02:30:26
24 Let's see if we can get you a PDF page for 02:30:29
25 that. Page 81 of the textbook, Exhibit 6. 02:30:31

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2 36. Page 36 of the PDF. 02:30:48

3 A. I'm there. 02:30:52

4 Q. All right. 02:30:53

5 So there's this whole, what is 02:30:53

6 it, section entitled 9.5 Sensitivity 02:30:57

7 Analysis Using Market Simulations. Of 02:31:00

8 course, feel free to read through it if 02:31:10

9 you'd like, but I'm going to ask the same 02:31:12

10 question. As used here in the section, 02:31:14

11 Sensitivity Analysis, what does that term 02:31:16

12 mean if you can educate me? 02:31:18

13 A. Yeah, everything I said before 02:31:23

14 is accurate. What is going on here is 02:31:25

15 Mr. Orme looking at specific use of market 02:31:34

16 simulations. 02:31:36

17 Q. Mm-hmm. 02:31:38

18 A. But as I see, particularly that 02:31:38

19 third paragraph there, looking at how a 02:31:40

20 product's market share or, in other words, 02:31:43

21 consumers' preferences for a product how 02:31:47

22 sensitive is it to changes in the 02:31:50

23 attributes. So let's say you add one 02:31:53

24 additional feature to that product profile, 02:31:55

25 what positive or negative impact does that 02:31:59

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2 have on the market share that is forecasted 02:32:01

3 for that product. That's how I look at this. 02:32:09

4 Q. Is your price premium analysis 02:32:15

5 using conjoint, is that a type of 02:32:17

6 sensitivity analysis or am I looking at it 02:32:22

7 the wrong way? 02:32:24

8 A. I didn't understand the base of 02:32:27

9 your question. 02:32:28

10 Q. As you just described what 02:32:31

11 sensitivity analysis is, does your price 02:32:33

12 premium analysis in this -- in your report, 02:32:36

13 does it employ sensitivity analysis? 02:32:38

14 A. Well, it's -- sure. So when I'm 02:32:45

15 calculating a market clearing price -- 02:32:47

16 Q. Yup. 02:32:49

17 A. -- for the prices with and 02:32:49

18 without the alleged misrepresentation, that 02:32:51

19 is a form of sensitivity analysis. I'm 02:32:56

20 looking at the extent to which the 02:33:00

21 marketplace is sensitive to a product not 02:33:02

22 having the alleged misrepresentation versus 02:33:05

23 one that does. It might be helpful, 02:33:09

24 counsel, if you just read that last full 02:33:24

25 paragraph on this page. That's -- 02:33:25

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2 Q. Mm-hmm. 02:33:27

3 A. That's where Mr. Orme does a 02:33:28

4 nice job of explaining how a market 02:33:29

5 simulator starts with the base condition, 02:33:33

6 the base case market, and what I did in my 02:33:35

7 market simulation analyses was alter that 02:33:41

8 base case market until the market price is 02:33:43

9 low enough for the product with the -- with 02:33:47

10 the misrepresentation -- sorry -- without 02:33:55

11 the misrepresentation, I've identified at 02:33:57

12 what price point will that product with the 02:33:59

13 misrepresentation equal the price -- 02:34:05

14 sorry -- equal the market share for the 02:34:07

15 other product. 02:34:08

16 Q. Okay, that's helpful. And is 02:34:14

17 Orme correct that you usually assume no 02:34:16

18 reaction by competitors in conducting this 02:34:21

19 type of analysis? 02:34:32

20 A. Well, again, he's looking at 02:34:33

21 this forward looking forecasting or 02:34:34

22 projection use case for conjoint surveys. 02:34:36

23 So that's his point of view or his starting 02:34:41

24 assumption, and talking about what conjoint 02:34:46

25 surveys are used for, and for my case that's 02:34:49

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2 not what I'm doing, I'm not forecasting for 02:34:57
3 the future, I am looking retroactively for 02:34:59
4 sales that have already been made and what 02:35:02
5 the price point would have been in the 02:35:03
6 marketplace if defendants did not have 02:35:05
7 access to this misrepresentation. 02:35:07

8 Q. Let's talk for a second about 02:35:30
9 Sawtooth. Sawtooth is the software that 02:35:32
10 you -- that you used in analyzing your 02:35:34
11 conjoint results; right? 02:35:42

12 A. Basically, yes. Basically. 02:35:47
13 It's the very short version of it. 02:35:49

14 Q. Okay. 02:35:51
15 And if you can educate me as to 02:35:52
16 the software, the Sawtooth software. What 02:36:01
17 exactly did you use the Sawtooth software to 02:36:03
18 do in your analysis? 02:36:08

19 A. Well, first of all, the 02:36:09
20 utilities, sometimes called the part worth 02:36:10
21 utilities -- 02:36:12

22 Q. Mm-hmm. 02:36:13

23 A. -- it should be calculated for 02:36:14
24 each respondent in my survey. So the first 02:36:16
25 task is to take the raw data that comes out 02:36:23

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2 of the survey itself. 02:36:25

3 Q. Yes. 02:36:26

4 A. And that raw data is just a 02:36:27

5 bunch of choices. Respondents are asked to 02:36:30

6 make 12 choices in the survey. Each choice 02:36:33

7 task reflects a certain combination of 02:36:35

8 product profiles, and the Sawtooth software 02:36:44

9 will calculate those part worth utilities 02:36:48

10 for each level of each tribute of each 02:36:51

11 respondent, so that's the first task, is 02:36:57

12 simply calculating those utilities, and then 02:36:59

13 from there the utilities are used by the 02:37:03

14 market simulation tool, which is a feature 02:37:10

15 within the Sawtooth software, so just unpack 02:37:12

16 it, Sawtooth has the entire data collection 02:37:16

17 package, which I personally did not use, but 02:37:20

18 they -- they have the package for actually 02:37:23

19 collecting the data from the respondents. 02:37:25

20 Q. Mm-hmm. 02:37:29

21 A. I just -- I use the lighthouse 02:37:29

22 tool, which is the analysis tool for 02:37:31

23 calculating the utilities, and then creating 02:37:34

24 those market simulations that I attach to my 02:37:36

25 expert report. 02:37:38

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2 Q. Who did the data collection that 02:37:48
3 you didn't use Sawtooth for? 02:37:51

4 A. Well, Sawtooth is just the 02:37:54
5 software. 02:37:56

6 Q. Yes. 02:37:57

7 A. So I did retain the firm Dynata 02:37:57
8 to actually administer my survey. I'm 02:38:02
9 sorry. Surveys, plural. 02:38:08

10 Q. Right. Actually let's start at 02:38:10
11 the part worth -- part worths in terms of a 02:38:14
12 measure of utility. Can you help me by 02:38:16
13 defining what you mean by part worth? 02:38:24

14 A. Mm-hmm. Sure. It's the actual 02:38:27
15 utility that the consumer places on that 02:38:29
16 level in the context of a choice task that's 02:38:33
17 put in front of the respondent, so it's 02:38:43
18 literally measuring the relative economic 02:38:45
19 value that consumers let's say put on the 02:38:49
20 brand Tom's of Maine when let's say the 02:39:00
21 label brand is natural and the price point 02:39:02
22 is \$4. 02:39:05

23 Q. Mm-hmm. 02:39:09

24 A. And then looking at that in 02:39:10
25 combination with what the other product 02:39:11

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2 profiles are in that choice task. So the 02:39:13
3 hierarchical base tool is running tens of 02:39:19
4 thousands of simulations, computing 02:39:29
5 simulations, building models, trying to 02:39:30
6 predict how much economic value a given 02:39:33
7 consumer places on each of these levels, of 02:39:38
8 each of these attributes. 02:39:42

9 Q. And why is it called, if you 02:39:45
10 know, why is it called a part worth? In 02:39:50
11 other words, part of what? 02:39:53

12 A. Part of the whole. So if 02:39:55
13 there's a hundred points to be allocated of 02:39:58
14 value for a product, how much of that value 02:40:02
15 is attributable to a brand level or a label 02:40:06
16 claim. 02:40:14

17 Q. Okay. 02:40:16

18 A. Or one of the product benefits 02:40:17
19 in my toothpaste survey. 02:40:18

20 Q. So just so I understand, let's 02:40:27
21 say there's a hundred, as you posited in 02:40:29
22 this hypothetical, a hundred points to be 02:40:31
23 allocated in terms of part worth, let's say 02:40:33
24 brand level -- we generate brand levels 02:40:35
25 for -- I'm sorry. We generate part worths 02:40:38

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2 for brand level and natural claim, those 02:40:41

3 equal 30 part worths, and you're saying the 02:40:47

4 remaining, conceptually the remaining 70 02:40:50

5 part worths are distributed among what, the 02:40:52

6 remaining features in the product or the 02:40:55

7 remaining features in the survey or what? 02:40:57

8 A. That's right. Among the product 02:41:00

9 profiles shown to respondents. 02:41:02

10 Q. Okay. 02:41:04

11 A. And this all occurs as a result 02:41:05

12 of the aggregation of all these choices that 02:41:07

13 consumers make across hundreds of potential 02:41:10

14 product profiles put in front of respondents. 02:41:18

15 Q. Okay. Let's talk for a second. 02:41:21

16 Let's go back to Sawtooth. Well, give me 02:41:28

17 one second. 02:41:43

18 Let's go back to your report, 02:41:43

19 Exhibit 1, paragraph 43, on page 18 of 02:41:44

20 your -- 02:41:53

21 A. Which paragraph number, counsel? 02:41:57

22 Q. Paragraph 43. 02:41:58

23 A. Okay. 02:42:10

24 Q. You got it? 02:42:10

25 A. Yes. Now I'm there. 02:42:11

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2 Q. In the actual choice tasks, 02:42:12

3 blah, blah, blah; right? 02:42:15

4 A. Right. 02:42:18

5 Q. Okay. 02:42:18

6 Third sentence of paragraph 43 02:42:19

7 of your report reads: While each product 02:42:21

8 profile has the same list of attributes, the 02:42:23

9 actual levels for each attribute are 02:42:26

10 randomly displayed with some documented 02:42:29

11 constraints. 02:42:31

12 Do you see that? 02:42:32

13 A. Yes. 02:42:34

14 Q. What are you referring to when 02:42:35

15 you say with some documented constraints? 02:42:36

16 A. Sure. I'd be happy to explain 02:42:42

17 that. Earlier we looked at the Excel sheet 02:42:45

18 that had the list of my attributes and 02:42:55

19 levels. 02:42:58

20 Q. Mm-hmm. 02:42:58

21 A. And there's a notes column on 02:42:59

22 the far right there where I documented the 02:43:00

23 constraints. So there was, in the 02:43:02

24 toothpaste survey -- pardon me -- in the 02:43:09

25 deodorant survey, there were two levels that 02:43:12

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2 both communicated the length of time that 02:43:15
3 the product is effective as a deodorant. So 02:43:17
4 it would have been confusing to respondents 02:43:22
5 if both those label claims appeared on the 02:43:24
6 same product profile. So I put in a 02:43:26
7 constraint so that a product profile could 02:43:38
8 have one, but not both of those levels. 02:43:40

9 Q. Okay. 02:43:47

10 And if I remember this 02:43:48
11 correctly, it was the 24 hours versus 48 02:43:49
12 hours protection; right? 02:43:50

13 A. That's right. 02:43:51

14 Q. Okay. 02:43:52

15 So we discussed earlier that 02:43:52
16 under that labeling claim, you could have 02:43:54
17 multiple of those levels on any one product 02:44:03
18 profile, this would be an exception to that 02:44:06
19 because you obviously can't have both 24 02:44:08
20 hour and 48 hour protection on the same 02:44:10
21 product; right? 02:44:12

22 A. Well, I mean, there was always 02:44:12
23 two or three or four levels shown to 02:44:14
24 respondents for label claims for a deodorant. 02:44:21

25 Q. Yeah. 02:44:23

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2 A. I'm just talking about a 02:44:24
3 prohibition against both of those label 02:44:25
4 claims appearing at the same time. 02:44:28

5 Q. Got it. 02:44:29

6 A. Okay. 02:44:30

7 Q. Let me pull up the next exhibit. 02:44:49

8 The next exhibit is Exhibit 9. 02:44:51

9 A. Okay. 02:44:52

10 MR. BUFF: Exhibit 9 has been 02:44:54

11 introduced. 02:44:56

12 (Dennis Exhibit 9, screenshots, 02:44:56

13 marked for identification, as of this 02:44:56

14 date.) 02:45:31

15 Q. Have you had a chance to look at 02:45:31

16 Exhibit 9, Dr. Dennis? 02:45:32

17 A. Yes. 02:45:32

18 Q. And we have been talking about 02:45:34

19 the Sawtooth software for a while, and I 02:45:35

20 assume you are familiar with the let's call 02:45:39

21 them screenshots that are displayed in 02:45:42

22 Exhibit 9, which is the Sawtooth -- some of 02:45:44

23 the Sawtooth settings that you can adjust; 02:45:51

24 is that right? 02:45:53

25 A. That's right. 02:46:15

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2 Q. And one of those, I'm going to 02:46:16
3 point you to the first page, two pages, and 02:46:18
4 the first page has the constraints, in blue 02:46:20
5 highlight it says constraints default, and 02:46:22
6 then the little box up top says use 02:46:25
7 constraints, and it's not ticked off, 02:46:27
8 there's a blank box there. 02:46:32

9 Do you see that? 02:46:33

10 A. That's right. 02:46:34

11 Q. Okay. 02:46:35

12 And, by the way, this -- the 02:46:35
13 Exhibit 9 is -- the heading up top says 02:46:37
14 CBC/HB Settings. I take it CBC stands for 02:46:41
15 choice-based conjoint? 02:46:44

16 A. That's right. 02:46:46

17 Q. Okay. 02:46:47

18 And then HB stands for 02:46:48
19 hierarchal base, I take it? 02:46:50

20 A. That's right. 02:46:53

21 Q. I guessed right. And then 02:46:54
22 looking at the first page of Exhibit 9, this 02:47:00
23 would be sort of the settings, a settings 02:47:02
24 page that you would encounter in the soft -- 02:47:10
25 Sawtooth software that you used for your 02:47:15

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2 analysis in this case; right? 02:47:17

3 A. That's right. 02:47:18

4 Q. Okay. 02:47:19

5 And the constraints let's call 02:47:34

6 setting that is highlighted, that's a 02:47:36

7 setting that you can turn off or turn on, in 02:47:38

8 other words, you can impose some constraints 02:47:41

9 on your data or you could not by default; 02:47:44

10 right? 02:47:48

11 A. Yes, that's right. 02:47:48

12 Q. And is the default in Sawtooth 02:47:49

13 not putting any constraints on data? 02:47:55

14 A. I believe that's right. It's a 02:47:56

15 user option to put in, in this case, price 02:48:01

16 constraints. 02:48:04

17 Q. Right. Price constraints. 02:48:05

18 And, but you can see where I'm 02:48:07

19 getting at, which is some of the price 02:48:08

20 constraints on the second page, but let me 02:48:10

21 just ask you, did you apply any sort of 02:48:12

22 price constraints on your -- on the data 02:48:15

23 from your conjoint survey in this case? 02:48:21

24 A. You know, I was just looking to 02:48:35

25 see if I did that. My short answer at 02:48:37

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2 this -- as I sit here right now, I'm not a 02:48:37
3 hundred percent confident if I did that or 02:48:40
4 not. It would be shown in the files that I 02:48:42
5 sent over to be shared with the defendants 02:48:45
6 about how I calculated the utilities. I 02:48:49
7 will say that it is my typical practice to 02:48:51
8 put in this price constraint because it's a 02:48:53
9 standard practice in conjoint surveys to 02:48:56
10 what's called reversals, in other words, put 02:49:03
11 in constraints so that if all else is equal 02:49:06
12 between two products shown a respondent, if 02:49:13
13 they choose the one that's more expensive, 02:49:16
14 that's an economically irrational thing to 02:49:19
15 do. Right? I mean, if two products are 02:49:21
16 exactly the same except one is \$1 more than 02:49:23
17 the other -- 02:49:26

18 Q. Right. 02:49:27

19 A. -- it's economically rational, 02:49:27
20 of course, to confer the less expensive 02:49:29
21 option. So it's often done in conjoint 02:49:38
22 studies to often put in this reversal -- 02:49:42
23 these reversals so that the respondent will 02:49:44
24 always and the data will reflect that 02:49:46
25 economic rationality. 02:49:49

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2 Q. Okay. 02:49:50

3 And is it your recollection 02:49:51

4 that's a constraint you applied here? 02:49:54

5 A. Again, I would have to look at 02:50:03

6 my underlying documentation, but that's my 02:50:04

7 typical practice, is to put in a price 02:50:06

8 constraint. 02:50:08

9 Q. You referenced your files that 02:50:09

10 you turned over a moment ago, and do you 02:50:10

11 know if you actually produced your Sawtooth 02:50:16

12 program files? I understand they're a .ssi 02:50:23

13 extension type file. Have you produced 02:50:26

14 those in this litigation for us to look at? 02:50:28

15 A. I know there was a supplemental 02:50:32

16 production, counsel, and I turned over 02:50:34

17 everything that I was asked to, so I don't 02:50:36

18 know at the moment whether I gave the SSI 02:50:40

19 file over. I remember turning over 02:50:43

20 everything that was asked of me. 02:50:50

21 Q. But you're not sure whether you 02:50:51

22 turned over -- first of all, by turned over, 02:50:53

23 you mean gave to Ms. Westcot's office? 02:50:56

24 A. Yes. That's right. Obviously I 02:50:59

25 do not have a direct connection to your law 02:51:01

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2 firm, counsel. 02:51:03

3 Q. Sure. 02:51:03

4 And you're not sure as you sit 02:51:04

5 here today whether you actually produced to 02:51:06

6 Ms. Westcot's office your underlying SSI 02:51:09

7 files, Sawtooth files; is that right? 02:51:12

8 MS. WESTCOT: Objection to form. 02:51:14

9 Asked and answered. And just for the 02:51:15

10 record, Mr. Lazatin, we did receive a 02:51:17

11 bulleted list of requests for 02:51:20

12 supplemental production from your 02:51:24

13 office that we forwarded to Dr. Dennis 02:51:27

14 and every item that was requested was 02:51:28

15 produced. 02:51:31

16 MR. LAZATIN: Okay. Well, thank 02:51:31

17 you, Ms. Westcot. Let me just confirm 02:51:33

18 with Dr. Dennis. 02:51:37

19 Q. Is it your understanding, 02:51:38

20 Dr. Dennis, that you have produced your SSI 02:51:39

21 files for Sawtooth to Ms. Westcot's office? 02:51:42

22 A. I'm sorry, counsel, it was a 02:51:50

23 long list of things and I faithfully 02:51:52

24 complied with it. I'm not sure what -- at 02:51:54

25 this moment what was on that list and what 02:51:56

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2 was not. 02:51:58

3 Q. All right. 02:51:59

4 If you do, if you in fact have 02:52:00

5 not produced your SSI files for your surveys 02:52:02

6 in this case, are you able to do so? 02:52:04

7 MS. WESTCOT: I'm going to 02:52:12

8 object to that request because there 02:52:13

9 was already a lengthy list of requests 02:52:15

10 for supplemental production from Dr. 02:52:17

11 Dennis from counsel for the defendants 02:52:19

12 and Dr. Dennis has complied with the 02:52:22

13 request for supplemental production. 02:52:24

14 Q. Dr. Dennis? 02:52:31

15 A. I will follow plaintiffs' 02:52:31

16 counsel advice on this. 02:52:34

17 Q. Excuse me, there has not been 02:52:35

18 any advice, there was a speech that was 02:52:37

19 given that frankly is improper, but I'm 02:52:38

20 asking if you're willing to turn over your 02:52:40

21 underlying SSI files if in fact you haven't 02:52:42

22 already done so. 02:52:44

23 Are you willing to do that? 02:52:48

24 A. If plaintiffs' counsel asks me 02:52:49

25 to do so, I will do so. 02:52:51

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2 Q. Great. 02:52:52

3 No reason you can't; right? I 02:52:56

4 mean, physically. You haven't lost them? 02:52:57

5 A. No, I would not lose files like 02:52:59

6 that. 02:53:02

7 Q. Okay. 02:53:08

8 Now, we were talking a minute 02:53:08

9 ago about imposing price constraints. You 02:53:10

10 said it was your typical practice to put in 02:53:12

11 price constraints at least to -- so that 02:53:14

12 economically irrational responses like 02:53:23

13 preferring a more expensive product, you 02:53:26

14 know, identical product to a cheaper product 02:53:28

15 would be constrained. 02:53:30

16 Did I gather that correctly? 02:53:34

17 A. That's right. 02:53:46

18 Q. Now, if you look at the second 02:53:47

19 page of Exhibit 9, you can see here the blue 02:53:48

20 highlight says constraints modified, and 02:53:51

21 then the box up top that says use 02:53:59

22 constraints is ticked off and there are a 02:54:02

23 number of shall I call them formulas listed 02:54:05

24 under the add is the plus time. The first 02:54:11

25 line reads price \$3 should be preferred over 02:54:15

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2 \$4, next line reads price should be 02:54:17

3 preferred over \$5 and so on. 02:54:20

4 Do you see that? 02:54:25

5 A. Yes. 02:54:28

6 Q. And my question is really a 02:54:29

7 mechanical one. If we were to have imposed 02:54:30

8 the type of constraints that we talked about 02:54:33

9 in terms of price constraints, would this 02:54:37

10 be -- would the second page of Exhibit 9 02:54:42

11 actually set forth how you would do that in 02:54:45

12 terms of changing the settings? 02:54:49

13 A. Yes. It looks very similar to 02:54:54

14 what I have done many times before in my 02:54:55

15 conjoint analyses. 02:55:01

16 Q. Do you recall whether you had 02:55:15

17 any, as you have described them, sort of 02:55:15

18 economically irrational responses on your 02:55:18

19 conjoint such that the responses showed 02:55:23

20 preferences for higher prices rather than 02:55:25

21 lower prices for the same product? Do you 02:55:27

22 recall if you had such results? 02:55:29

23 A. Yeah, every conjoint survey that 02:55:30

24 I've done, there's outlier respondents that 02:55:32

25 will choose what's called dominated 02:55:36

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2 alternatives, and it does happen. That's 02:55:41
3 why Sawtooth has this feature within -- it's 02:55:47
4 one reason Sawtooth has this feature to put 02:55:49
5 in price constraints because it's well-known 02:55:52
6 that some respondents will waiver in their 02:55:56
7 attention that they're spending on the 02:56:03
8 exercise and it's possible they'll choose 02:56:05
9 some irrational responses, so we take that 02:56:08
10 into account by having this kind of 02:56:11
11 constraint option, so it's a -- the 02:56:13
12 statistical outliers can be corrected 02:56:17
13 through this kind of constraint option. 02:56:21

14 Q. And did you say that these sort 02:56:29
15 of economically irrational responses, they 02:56:31
16 sometimes can be indicative of, actually 02:56:35
17 what you just said, indicative of the 02:56:37
18 respondent maybe not paying attention to the 02:56:42
19 choice tasks? 02:56:46

20 A. Every expert will tell you the 02:56:54
21 same thing. You know, when you ask a 02:56:56
22 respondent to make twelve choices, it's 02:56:57
23 possible that their attention can vary from 02:56:59
24 screen to screen, meaning from choice task 02:57:01
25 to choice task, so, you know, we're humans, 02:57:04

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2 we're not perfect. Some people occasionally 02:57:07
3 will make a mistake. So it's just a fact of 02:57:09
4 survey research that -- and that's why I use 02:57:15
5 the term outliers, I use the term outlier 02:57:19
6 purposely. It would be typically a small 02:57:21
7 minority of actual choices that are 02:57:23
8 resulting in, you know, this kind of 02:57:28
9 economic irrationality. 02:57:38

10 Q. When you mentioned a small 02:57:38
11 minority of actual choices, did you check to 02:57:41
12 see how often -- how frequently your survey 02:57:44
13 data generated these sort of outlier 02:57:48
14 economically irrational choices? 02:57:53

15 A. I didn't look at it personally. 02:58:08
16 I did see some analysis that your expert had 02:58:09
17 done on this. I didn't see that analysis 02:58:11
18 done at the choice level. I saw it done at 02:58:14
19 the respondent level. So, now, I haven't 02:58:17
20 done that task yet. Typically it's a small 02:58:20
21 percentage of the actual choices that need 02:58:27
22 to be reversed because of the price 02:58:29
23 constraint. 02:58:30

24 Q. What's a small percentage? 02:58:39

25 A. I'm not going to ballpark what a 02:58:40

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2 small percentage is, but it's typically not 02:58:42

3 a large percentage. 02:58:44

4 Q. Typically not higher than 5% of 02:58:45

5 responses? 02:58:48

6 A. I kind of -- I'm not just going 02:58:53

7 to, you know, throw out a number, but 02:58:54

8 typically if you look at all the choices 02:58:56

9 made in this case, about a thousand 02:58:58

10 respondents times 12 choices, it tends to be 02:59:01

11 a pretty small percentage that need to be 02:59:06

12 reversed. 02:59:08

13 Q. Is 10% a typical small 02:59:18

14 percentage that you would encounter that 02:59:20

15 would need to be reversed? 02:59:23

16 A. Again, I hesitate to put out 02:59:27

17 what small means. I would look at the 02:59:29

18 analysis and, furthermore, look at what 02:59:30

19 implications, if any, there are for the 02:59:34

20 price premium results, does it have any 02:59:36

21 impact whatsoever on the survey results by 02:59:38

22 enforcing this price constraint versus not. 02:59:50

23 Those are the -- those are analyses to do. 02:59:53

24 Q. Would you consider 60% of 03:00:02

25 respondents to your survey having these 03:00:04

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2 outlier choices, economically irrational 03:00:12

3 choices, would you consider 60% to be a 03:00:13

4 small percentage that you typically 03:00:16

5 encounter? 03:00:20

6 A. Again, your -- I was being very 03:00:25

7 precise in my language earlier, now you're 03:00:28

8 using a different metric. I was talking 03:00:30

9 about the percentage of actual choices made, 03:00:32

10 and now you're giving me a metric based on 03:00:34

11 number of respondents. 03:00:38

12 Q. Right. 03:00:39

13 A. So that's a -- it's a very 03:00:40

14 different metric. 03:00:42

15 Q. I understand. I'm asking you on 03:00:46

16 my metric, if 60% of your respondents have 03:00:47

17 at least one instance where they've had to 03:00:51

18 have their outlier economically irrational 03:00:53

19 response corrected, do you consider that to 03:00:57

20 be a small percentage that's typical of what 03:01:00

21 you should find in your work? 03:01:09

22 MS. WESTCOT: Objection. Vague. 03:01:11

23 Calls for speculation. 03:01:13

24 A. Again, I did see that in your 03:01:14

25 Defendant's expert report on that, and my 03:01:16

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2 first reaction was, well, it's just the 03:01:18
3 wrong analysis to do. What matters is the 03:01:20
4 percentage of total choices. So I thought 03:01:22
5 the 60% was a not useful way to look at this 03:01:33
6 and not a basis to be alarmed. What matters 03:01:38
7 is the percentage of the choice task 03:01:39
8 themselves. 03:01:42

9 Q. Right. And so there's, if we 03:01:43
10 just do the math right, you know, there's 03:01:45
11 12,000 choice tasks; right? 03:01:48

12 A. Yeah. A thousand times 12. 03:01:49

13 Q. Okay. 03:01:51

14 And so with 12,000 choice tasks, 03:01:52
15 we're using your metric and also your term, 03:01:57
16 you use the term typical, for 12,000 choice 03:02:00
17 tasks, what is a typical small percentage 03:02:03
18 that you would expect to see these 03:02:05
19 irrational choices? 03:02:07

20 A. Again, I hesitate and will not 03:02:13
21 provide a ballpark on that for you. 03:02:14

22 Q. Okay. 03:02:17

23 A. As I said, I can do it, but I'm 03:02:18
24 not going to give you an off the cuff 03:02:20
25 ballpark on that. 03:02:22

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2 Q. All right. So -- 03:02:23

3 A. Because it is -- it's not 03:02:24

4 uncommon -- it's not uncommon for 03:02:26

5 individuals to need to have their -- have 03:02:28

6 some level of reversals made. What is more 03:02:35

7 important is looking at that Root Likelihood 03:02:38

8 score and see if the Root Likelihood score 03:02:41

9 is indicative that respondents are answering 03:02:44

10 these choice tasks consistently, and it's a 03:02:46

11 measure of the extent to which consumers are 03:02:50

12 answering these preference questions 03:02:56

13 consistently, consistently valuing the same 03:02:58

14 attributes and levels across all the 12 03:03:01

15 choice tasks. 03:03:04

16 Q. Okay. 03:03:12

17 So in the same example that I 03:03:12

18 gave of a hypothetical, well, it's your 03:03:13

19 example you gave of 12,000 choice tasks, you 03:03:16

20 can't tell me whether 1,000 of those choice 03:03:18

21 tasks yielding these outlier responses is 03:03:20

22 typical? 03:03:24

23 A. No, I hesitate and will not 03:03:33

24 provide you an off the cuff ballpark on 03:03:34

25 that. 03:03:37

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2 Q. And if I told you 6,000 of those 03:03:37
3 responses involved irrational, economically 03:03:38
4 irrational choices, you can't tell me if 03:03:41
5 that's typical either? 03:03:45

6 MS. WESTCOT: Objection. Asked 03:03:49
7 and answered. 03:03:50

8 A. No, I would do the analysis 03:03:50
9 myself and see exactly how it's done before 03:03:51
10 I reach any conclusions on that. 03:03:54

11 Q. Okay. 03:03:55

12 And going back to the idea of 03:03:56
13 the constraints, I want to be clear on this 03:03:59
14 when you put constraints, the constraints 03:04:13
15 that we described, which is on Exhibit 9, 03:04:14
16 which is you impose the constraints that 03:04:15
17 they can't -- the respondents cannot prefer 03:04:16
18 a more expensive product to a cheaper 03:04:20
19 product -- right -- you don't just throw out 03:04:21
20 those results; correct? 03:04:26

21 A. No, of course not. This is a -- 03:04:33
22 and just to clarify, when all else is equal 03:04:35
23 between the two products -- 03:04:37

24 Q. Yeah. 03:04:39

25 A. -- the consumers are choosing 03:04:39

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2 from, that's when the constraint applies and 03:04:41
3 it's not a removal, it's -- you can see the 03:04:45
4 constraint language right there, about \$5 03:04:49
5 should be preferred to \$6, so that's a 03:04:53
6 reversal, so it will, the analysis will take 03:04:55
7 the reversal into account as if the 03:05:02
8 respondent was rational and chose the less 03:05:04
9 expensive option. 03:05:07

10 Q. Okay. 03:05:08

11 So if, let me just use the first 03:05:08
12 example, first line of the second page, 03:05:11
13 which is price of \$3 should be preferred 03:05:17
14 over \$4. Would you look at that line? 03:05:19

15 A. Sure. 03:05:23

16 Q. So just so I'm understanding 03:05:23
17 mechanically how this works in the software, 03:05:25
18 if there's a response from a particular 03:05:27
19 respondent that said he preferred the \$4 03:05:30
20 over the -- the \$4 product over the \$3 03:05:32
21 product, his response for purposes of your 03:05:36
22 calculations is changed so that he prefers 03:05:39
23 the \$3 product instead of the \$4 product? 03:05:42

24 A. Yes. That's fair. 03:05:46

25 Q. Okay. I think I understand 03:05:57

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2 that. We can set aside Exhibit 9. 03:05:59

3 MR. LAZATIN: Why don't we take 03:06:33

4 a break. I thought I was -- I'm nearly 03:06:34

5 done, but -- 03:06:36

6 THE VIDEOGRAPHER: We are going 03:06:37

7 off the record. This is the end of 03:06:37

8 media unit 5. The time is 3:05 p.m. 03:06:38

9 (Whereupon, a brief recess was 03:18:20
10 taken.) 03:18:28

11 THE VIDEOGRAPHER: We are back 03:18:28

12 on the record. This is the start of 03:18:28

13 media unit 6. The time is 3:17 p.m. 03:18:30

14 CONTINUED BY MR. LAZATIN: 03:18:40

15 Q. Dr. Dennis, we talked before the 03:18:40

16 break about how you use the Sawtooth 03:18:42

17 software to, at least in one step of the 03:18:46

18 analysis, to calculate the part worth using 03:18:48

19 the raw data from the survey; is that -- is 03:18:55

20 that correct? 03:18:58

21 A. We did talk about that, counsel. 03:18:58

22 Q. Do you recall -- sorry. Scratch 03:19:00

23 that. 03:19:05

24 Do you know if it is possible to 03:19:05

25 do those calculations manually without the 03:19:13

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2 software? 03:19:15

3 A. Well, I think it -- calculating 03:19:26

4 the utilities requires generating in often 03:19:30

5 cases often tens of thousands of statistical 03:19:33

6 model, so my understanding is that 03:19:36

7 hierarchal-based estimation became 03:19:38

8 mainstreamed when computing power increased 03:19:42

9 and we were able to do those simulations, so 03:19:45

10 using the software, I don't know, is it 03:19:49

11 possible to do it by hand. Perhaps. I have 03:19:51

12 not done that. 03:19:54

13 Q. All right. 03:20:03

14 Let me ask you about, we talked 03:20:04

15 earlier about market competition. Remember 03:20:23

16 we were talking about market competition 03:20:25

17 being a supply side factor that you 03:20:27

18 considered in your conjoint; correct? 03:20:29

19 A. Yes. 03:20:36

20 Q. Okay. 03:20:36

21 And what I'm going to ask you, 03:20:36

22 your conjoint does not model competitor's 03:20:39

23 reactions to the natural claim being taken 03:20:56

24 off, in other words, whatever change in 03:20:59

25 price or change in quantity might take place 03:21:03

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2 in a world where the change in price and 03:21:05
3 change in quantity of competitor products 03:21:10
4 would have been if the natural claim were 03:21:14
5 taken off the label; right? 03:21:19

6 A. Well, the obvious reason I do 03:21:21
7 not model in competitor reactions is that 03:21:24
8 all these sales took place in the past, so 03:21:27
9 competitors do not have an opportunity to 03:21:30
10 rewrite history or, for that matter, 03:21:35
11 defendants do not have the opportunity to 03:21:39
12 rewrite history. All these sales happened 03:21:41
13 in the past. It's irrelevant how 03:21:45
14 competitors would react to this change in 03:21:46
15 the defendants marketing not using this 03:21:51
16 alleged misrepresentation. 03:21:53

17 Q. And I fully appreciate that. 03:21:58
18 You and I have had this discussion before, 03:22:00
19 and I understand your point and Mr. Weir's 03:22:03
20 about past price and past quantity -- well, 03:22:06
21 past quantity being fixed as a matter of 03:22:12
22 history as I think both of you call it; 03:22:14
23 right? 03:22:16

24 A. That's right. The sales are a 03:22:19
25 matter of history. 03:22:22

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2 Q. Right. So, you know, we have 03:22:23
3 a -- your side and mine have a disagreement 03:22:24
4 about this topic because I understand you 03:22:27
5 don't think it's appropriate to consider 03:22:29
6 changes -- competitor changes or competitive 03:22:31
7 reactions in the but for world, but I just 03:22:33
8 want to be clear for the record about, you 03:22:41
9 know, what scenarios you did or didn't take 03:22:43
10 into account in the conjoint as you designed 03:22:45
11 it. Okay? 03:22:48

12 A. That's fair. 03:22:48

13 Q. So where, in the but for world 03:22:49
14 where Tom removes the natural claim -- 03:22:51

15 A. Right. 03:23:00

16 Q. -- from its packaging for 03:23:00
17 toothpaste and deodorant, one possible 03:23:03
18 hypothetical scenario in my scenario is what 03:23:05
19 is posited by your survey, which is that 03:23:08
20 Tom's lowers its prices; right? Because the 03:23:15
21 natural label is now gone. Are we following 03:23:17
22 each other? 03:23:19

23 A. I am. 03:23:20

24 Q. Okay. 03:23:24

25 Now, in that instance, one 03:23:25

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2 possible competitor reaction is that 03:23:27

3 competitors just keep their prices the same; 03:23:28

4 right? 03:23:30

5 A. That's -- yes. So we're talking 03:23:32

6 about -- I mean, obviously this is -- we 03:23:37

7 have different paradigms here, counsel. 03:23:39

8 You're talking about history taking a 03:23:42

9 different path than it could have. 03:23:45

10 Q. Right. And that's what I'm 03:23:49

11 asking about. So live in my hypothetical 03:23:50

12 for a moment. Okay? So as your survey 03:23:53

13 posits, natural claim is gone, Tom's lowers 03:23:56

14 its prices, one competitive reaction could 03:23:59

15 be competitors keep their prices the same? 03:24:01

16 A. Okay. 03:24:17

17 Q. Now, in that instance, some of 03:24:17

18 the competitors might stick with Tom's 03:24:19

19 because Tom's is cheaper relative to the 03:24:20

20 competition; fair? 03:24:22

21 MS. WESTCOT: Objection to form. 03:24:25

22 A. I mean, some might switch over 03:24:26

23 to the new brands that lowered their -- you 03:24:27

24 said that in your scenario, the competitors 03:24:29

25 kept their price the same? 03:24:32

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2 Q. That's right. 03:24:33

3 A. And in my model's predicting 03:24:34

4 that Tom's had to make that price reduction 03:24:37

5 in order to be competitive. 03:24:43

6 Q. That's right. 03:24:44

7 And my question is if the 03:24:44

8 competitor -- one -- we have established one 03:24:47

9 scenario is the competitors keep their 03:24:49

10 prices the same, right, because they've got 03:24:51

11 what people think to be the natural product, 03:24:53

12 actual natural product; right? 03:24:55

13 A. Okay. 03:24:57

14 Q. So one thing that could happen 03:25:08

15 is, as we've posited some, Tom's consumers 03:25:11

16 might stick with Tom's because Tom's is now 03:25:13

17 cheaper; right? 03:25:17

18 A. Well, the model is predicting 03:25:17

19 that's the market clearing price in the 03:25:20

20 scenario where Tom's is not using the 03:25:21

21 natural claim, that there would be a price 03:25:23

22 reduction. 03:25:26

23 Q. Right. 03:25:27

24 And some consumers as a result 03:25:27

25 might still stick with Tom's because it's 03:25:29

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2 now cheaper; right? Some. 03:25:31

3 MS. WESTCOT: Objection to form. 03:25:33

4 Calls for speculation. 03:25:36

5 A. Yeah, I mean, it's -- the model 03:25:37

6 built is making a prediction on the market 03:25:39

7 clearing price. It's not making a 03:25:41

8 prediction on the composition of those -- - 03:25:43

9 of the actual consumers. 03:25:54

10 Q. Sure. And I'm getting to that. 03:25:54

11 Another -- another possibility 03:25:56

12 is I think the one you just posited, which 03:25:57

13 is that some consumers leave Tom's, right, 03:26:01

14 Tom's gets fewer sales from them because 03:26:04

15 they're willing to pay more for the now more 03:26:04

16 expensive natural competitor products; 03:26:09

17 right? 03:26:12

18 MS. WESTCOT: Objection to form. 03:26:12

19 Calls for speculation. 03:26:13

20 A. Yeah, it's all hypothetically 03:26:13

21 speaking. 03:26:15

22 Q. But that's a possibility, is it 03:26:17

23 not? 03:26:18

24 A. There are a lot -- 03:26:19

25 MS. WESTCOT: Objection to form. 03:26:21

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2 Calls for speculation. 03:26:21

3 A. There are a lot of 03:26:22

4 possibilities. It's all speculation. 03:26:23

5 Q. I'm asking you if this is one of 03:26:25

6 them. 03:26:26

7 MS. WESTCOT: Same objections. 03:26:27

8 A. Well, it's hard to rule out, you 03:26:27

9 know, possibilities here. I mean, all these 03:26:29

10 things are possible. I mean, the way 03:26:33

11 scientists work is we -- we'll tolerate the 03:26:35

12 consideration of lots of different 03:26:39

13 possibilities because we don't have data to 03:26:44

14 say that it's impossible for a scenario to 03:26:46

15 occur, so these are -- these are 03:26:48

16 hypotheticals, of course, you're offering, 03:26:50

17 and I'm -- it would be foolish for me to 03:26:51

18 just reject them out of hand as 03:26:53

19 possibilities. 03:26:57

20 Q. Okay. I appreciate that. 03:26:57

21 Let me give you one other 03:26:58

22 possibility. Some consumers might switch to 03:27:00

23 Tom's who weren't buying Tom's before 03:27:02

24 because there is a new lower price for 03:27:08

25 Tom's; right? Possible? 03:27:10

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2 MS. WESTCOT: Objection to form. 03:27:13

3 Calls for speculation. 03:27:14

4 A. I don't know. I don't know what 03:27:14

5 would happen. These are all sales that 03:27:16

6 happened in the past, but I'm trying to buy 03:27:17

7 into your -- your paradigm. 03:27:19

8 Q. Right. 03:27:21

9 And so my point is the conjoint 03:27:34

10 that you designed, it's not designed to tell 03:27:35

11 us what happens in the various scenarios I 03:27:38

12 just painted for you, right, how many 03:27:40

13 consumers Tom's loses, how many it gains, 03:27:42

14 what competitors ends up doing to their 03:27:44

15 pricing and their quantity if they're 03:27:47

16 willing to sell; correct? 03:27:49

17 MS. WESTCOT: Objection to form. 03:27:50

18 Vague. Compound. 03:27:51

19 A. I've been very clear what this 03:27:52

20 analysis actually does. It establishes a 03:27:53

21 market clearing price for the product 03:28:01

22 without the misrepresentation on it, and, 03:28:02

23 you know, and estimating that price premium 03:28:04

24 in an undifferentiated way. It's agnostic 03:28:09

25 on which subgroups of consumers would 03:28:11

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2 benefit and those that would not. It's 03:28:15

3 assuming that the price would just be lower 03:28:18

4 by a certain discount if defendants did not 03:28:28

5 have this misrepresentation on their products. 03:28:30

6 Q. That Tom's prices would be 03:28:32

7 lower? 03:28:33

8 A. That's right. 03:28:33

9 Q. It doesn't model what 03:28:34

10 competitors might do to their pricing if 03:28:35

11 Tom's prices were lower; right? 03:28:39

12 A. That's right, but, again, we are 03:28:47

13 in different worlds, different paradigms 03:28:48

14 here. I have explained and I think you 03:28:50

15 understand how the price premium analyses 03:28:52

16 were applied in my report and then Mr. Weir's 03:29:00

17 presumably. It is all being applied to 03:29:02

18 transactions that have already occurred, so 03:29:04

19 the assumption is that there's no second 03:29:06

20 chances here for defendants to react in a 03:29:08

21 different way or, for that matter, for 03:29:11

22 competitors to change their pricing tactics 03:29:14

23 and strategies because the transaction's 03:29:17

24 already happened. 03:29:20

25 Q. I fully understand that, 03:29:27

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2 Dr. Dennis, just stick with me for a second 03:29:28
3 because we are in different paradigms and I 03:29:30
4 am asking you questions about my paradigm 03:29:32
5 and to what extent the conjoint can account 03:29:34
6 for what happens in my paradigm or not. 03:29:39
7 Okay? 03:29:41

8 In the situation, again, we're 03:29:42
9 still in the scenario where Tom's has 03:29:44
10 lowered its prices, no longer has the 03:29:46
11 natural claim, there's a scenario in which 03:29:49
12 competitors might lower their prices. Your 03:29:54
13 conjoint doesn't model that scenario either, 03:29:56
14 correct? 03:29:58

15 MS. WESTCOT: Objection to form. 03:29:58

16 A. No, I mean, we can make this 03:29:59
17 very simple. Right? I mean, strategic 03:30:01
18 behavior by Tom's for that matter or by its 03:30:03
19 competitors by virtue of the paradigm 03:30:08
20 selected here of using historical 03:30:15
21 transactions, strategic behavior like that 03:30:17
22 is not modeled for, it's not appropriate in 03:30:19
23 my view to model competitors' reactions for 03:30:22
24 sales that have already occurred. Could the 03:30:31
25 analyses you're talking about be done? I 03:30:33

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2 think that it's, in my own view, not the 03:30:35

3 appropriate analyses to do. 03:30:37

4 Q. So I think perhaps -- I think 03:30:45

5 we're, you know, I think we're understanding 03:30:47

6 each other, so maybe to cut to the chase 03:30:48

7 here, the conjoint, for the reasons you've 03:30:50

8 already explained, your conjoint analysis 03:30:52

9 does not model, take into account scenarios 03:30:54

10 in which Tom's lowers its prices and that 03:30:56

11 has an effect on competitors and we lower 03:31:07

12 their prices, keep their prices the same, 03:31:09

13 raise their prices does not model that; 03:31:11

14 correct? 03:31:14

15 MS. WESTCOT: Objection to form. 03:31:18

16 Vague. Compound. Assumes facts not in 03:31:19

17 evidence. Asked and answered. 03:31:21

18 A. Yeah, I think I've been very 03:31:22

19 clear on this. It -- what's really 03:31:24

20 important here from my point of view, 03:31:28

21 counsel, it's not a question of whether the 03:31:30

22 strategic behavior should be modeled and 03:31:38

23 taken into account -- let me put it this 03:31:40

24 way. That is the question, is about whether 03:31:46

25 to take into account those, and it's my 03:31:48

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2 opinion that it's inappropriate to deliver 03:31:51
3 in this case to Mr. Weir a market clearing 03:31:59
4 price that acts as if plaintiff -- 03:32:02
5 defendants had another opportunity to alter 03:32:08
6 their behavior or for competitors to react 03:32:12
7 to this lower price. The fact is that 03:32:15
8 defendants, according to at least my survey, 03:32:20
9 have been able to acquire a financial 03:32:23
10 advantage over time as a result of having 03:32:26
11 this misrepresentation on the products, and 03:32:30
12 that cannot be undone. 03:32:32

13 Q. All right. I totally understand 03:32:35
14 your explanation; right? I get it. I'm 03:32:37
15 asking you in my but for world where market 03:32:41
16 participants, including Tom's, and including 03:32:45
17 its competitors, are able to make different 03:32:48
18 decisions with Tom's having taken off 03:32:52
19 natural from its label, my question is: 03:32:56
20 Your model does not account for the scenario 03:33:01
21 where Tom's lowers its prices and the 03:33:07
22 competitors maybe adjust their prices or 03:33:11
23 their quantities sold in response and tell 03:33:13
24 us which consumers go where and pay what 03:33:17
25 price; right? 03:33:23

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2 MS. WESTCOT: Objection to form. 03:33:24

3 Compound. Asked and answered. Assumes 03:33:26

4 facts not in evidence. 03:33:28

5 A. I've already stated that I think 03:33:39

6 it's inappropriate to build in those 03:33:41

7 strategic behavior changes that could have 03:33:43

8 occurred in the past, but to answer your 03:33:45

9 question, counsel, honestly I feel like I 03:33:47

10 have been straightforward in saying that 03:33:49

11 price premium analyses I did not attempt to 03:33:58

12 model competitors' reactions to Tom's having 03:34:00

13 a lower price point. I don't think I can be 03:34:03

14 clearer on that. What I've been trying to 03:34:06

15 do is be clear on the record as to why that 03:34:07

16 decision was made. 03:34:09

17 Q. Okay, I appreciate that, and if 03:34:15

18 I were to posit to you that Tom's might have 03:34:31

19 kept its prices the same as well and then 03:34:33

20 competitors might have reacted in that 03:34:35

21 scenario, that's not something, that sort of 03:34:37

22 competitors' reaction is not modeled in your 03:34:43

23 conjoint either; correct? 03:34:46

24 MS. WESTCOT: Objection to form. 03:34:49

25 Vague. Compound. Calls for 03:34:51

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2 speculation. 03:34:52

3 A. I think all my previous answers 03:34:59

4 apply to the same scenario you just gave me 03:35:01

5 for the same reasons. 03:35:03

6 Q. So not modeled in your conjoint 03:35:04

7 for all the reasons you stated? 03:35:06

8 A. Yes. I hope the record could be 03:35:07

9 clear on the reasoning why these strategic 03:35:09

10 behaviors are not modeled for sales that 03:35:15

11 already happened. 03:35:17

12 Q. Could we turn back to your 03:35:26

13 report, please. 03:35:27

14 A. Sure. 03:35:28

15 Q. And maybe you can help me pull 03:35:49

16 these up. Bear with me one second. Are the 03:35:51

17 McMorrow and Fitzhenry listed on your CV at 03:36:19

18 Attachment A? 03:36:24

19 A. I'm not sure about Fitzhenry. 03:36:25

20 That's Canada Dry, I think; right? I think 03:36:26

21 that one might have been more than four 03:36:34

22 years ago, but I can look at my report. 03:36:36

23 I do see McMorrow in my CV. 03:37:16

24 Q. Mm-hmm. 03:37:20

25 A. I think Fitzhenry -- 03:37:40

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2 it just depends on how memorable and salient 04:09:19
3 the purchase is. So hopefully that helps 04:09:22
4 answer your question, counsel. 04:09:27

5 Q. I appreciate that, Dr. Dennis. 04:09:31

6 And then the last thing counsel 04:09:34
7 asked you about was whether you thought 04:09:36
8 there would be any difference in your survey 04:09:38
9 results if you limited your survey 04:09:40
10 population to those who had first purchased 04:09:44
11 in the last 12 months versus those who may 04:09:49
12 have purchased in the last 12 months, but 04:09:52
13 also purchased prior to the last 12 months. 04:09:54

14 Do you recall that testimony you 04:09:56
15 just gave? 04:09:57

16 A. I do. 04:09:58

17 Q. Okay. 04:10:03

18 My question is: You have not 04:10:04
19 actually studied, you have not actually 04:10:06
20 compared the purchase preferences of the 04:10:08
21 folks who purchased for the first time in 04:10:13
22 the last 12 months versus the longer term 04:10:14
23 purchasers of these products; correct? You 04:10:19
24 didn't study that? 04:10:22

25 MS. WESTCOT: Objection to form. 04:10:23

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2 A. I have not yet conducted those 04:10:26
3 analyses. I was basing my answer, counsel, 04:10:27
4 on 25 plus years of running cross-tabulations 04:10:31
5 on survey results and trying to find 04:10:35
6 instances where the survey results differ as 04:10:38
7 a result of subgroups that I'm analyzing, 04:10:42
8 and I was relying on my experience in doing 04:10:45
9 those kinds of cross-tabulations and 04:10:48
10 segmentation analyses of consumers when the 04:10:51
11 research question involves a nationally 04:10:59
12 marketed good like a toothpaste or a 04:11:01
13 deodorant product. 04:11:03

14 Q. Are you aware, Dr. Dennis, that 04:11:05
15 there have been label changes to the very 04:11:07
16 products -- some of the very products at 04:11:09
17 issue in this case over the past 24 months? 04:11:11
18 Were you aware of that? 04:11:13

19 MS. WESTCOT: Objection. 04:11:15
20 Outside the scope of the redirect. 04:11:16

21 A. I have some awareness of that, 04:11:22
22 but not a deep awareness. 04:11:25

23 Q. What are you aware of? 04:11:27

24 MS. WESTCOT: Same objection. 04:11:31

25 Mr. Lazitan, these questions were not 04:11:32

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2 asked on redirect. This is a whole 04:11:34

3 other area that you're opening up now 04:11:36

4 which is improper. 04:11:38

5 Q. What is your awareness? 04:11:38

6 MS. WESTCOT: Same objection. 04:11:42

7 Are you going to continue with 04:11:42

8 questions outside the scope of the 04:11:43

9 redirect? 04:11:44

10 MR. LAZATIN: It's not outside 04:11:46

11 the scope -- 04:11:47

12 MS. WESTCOT: I did not ask 04:11:48

13 about -- 04:11:49

14 MR. LAZATIN: -- of the 04:11:51

15 redirect. Okay? You asked him about 04:11:52

16 his assessment of what might change in 04:11:54

17 a survey to change the pool of people 04:11:58

18 who are being surveyed, and this is 04:12:01

19 something that bears materially on that 04:12:03

20 pool of people. It's not outside the 04:12:04

21 scope. 04:12:08

22 Q. Dr. Dennis, would you go ahead 04:12:08

23 and answer my question, please. What do you 04:12:09

24 understand about labeling changes that 04:12:11

25 occurred on these products in the last 24 04:12:12

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2 months? 04:12:14

3 MS. WESTCOT: I'm going to make 04:12:15

4 the same objection for the record. If 04:12:16

5 you could please not interrupt my 04:12:17

6 objection. This is outside the scope 04:12:19

7 of the redirect. I will allow the 04:12:20

8 witness to answer, but this is outside 04:12:22

9 the scope of my questioning, 04:12:24

10 questioning regarding package changes. 04:12:25

11 A. Like I said, counsel, I do not 04:12:29

12 have a deep understanding. The extent of my 04:12:31

13 knowledge has been that there's been some 04:12:34

14 label changes recently. That's all I know. 04:12:38

15 Q. Thank you very much for your 04:12:43

16 time, Dr. Dennis. That's all I have. 04:12:44

17 A. Thank you. 04:12:46

18 MS. WESTCOT: Nothing further 04:12:47

19 from the plaintiffs. Thank you, 04:12:48

20 Dr. Dennis. 04:12:49

21 THE WITNESS: Thank you. 04:12:50

22 THE VIDEOGRAPHER: We are off 04:12:50

23 the record at 4:12 p.m. and this 04:12:51

24 concludes today's testimony given by 04:12:53

25 Dr. Michael Dennis. The total number 04:12:55

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2 of media units used was six and will be 04:12:57

3 retained by Veritext Legal Solutions. 04:13:02

4 MR. LAZATIN: Thank you. What 04:13:07

5 was our time count, just -- 04:13:08

6 THE VIDEOGRAPHER: Stand by and 04:13:11

7 I will get it for you right now. 04:13:11

8 (Time noted: 4:13 p.m.)

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C E R T I F I C A T E

STATE OF NEW YORK)

) ss.:

COUNTY OF NASSAU)

I, ROBIN LaFEMINA, a Registered
Professional Reporter, Certified LiveNote
Reporter and Notary Public, do hereby
certify:

That DR. MICHAEL DENNIS, the
witness whose deposition is hereinbefore set
forth, was duly sworn by me and that such
deposition is a true record of the testimony
given by such witness.

I further certify that I am not
related to any of the parties to this action
by blood or marriage; and that I am in no
way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have
hereunto set my hand this 20th day of September,
2022.



ROBIN LaFEMINA